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7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE DISTRICT OF ARIZONA  
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12 Denard Darnell Neal, )  
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14 ) Petitioner, ) 2:90-CR-00003-PHX-RCB  
15 )  
16 ) vs. ) O R D E R  
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28 )  
United States of America, )  
Respondent. )  
\_\_\_\_\_)

18 Currently pending before the court are four motions by  
19 petitioner *pro se*, Denard Darnell Neal. Chronologically,  
20 based upon filing date, the first is a "Request for Immediate  
21 Change of Venue[.]" Mot. (doc. #215) (emphasis omitted).  
22 Second is petitioner's motion "to vacate void [sic] judgment  
23 pursuant to Rule 60(b)(3)[.]" Mot. (doc. #216). Third,  
24 petitioner has filed a "Request for Status of Filed  
25 Documents[.]" Mot. (doc. #217). Fourth, petitioner Neal also  
26 "Request[s] [a] Waiver of Costs, Fees, and Fines[]" (doc.  
27 221) associated with his Notice of Appeal filed in the Ninth  
28 Circuit Court of Appeals on March 18, 2010 (doc. 218).

1 Petitioner's affidavit "to proceed on appeal *in forma*  
2 *pauperis*[]" ("IFP")}" accompanies that last request. See  
3 Aff. (doc. 222) at 1 (emphasis added). For the reasons set  
4 forth below, the court DENIES all four motions in their  
5 entirety.

### 6 **Background**

7 Petitioner Neal is an habitual filer of motions of  
8 various kinds all attacking, in one way or another, his 1990  
9 conviction and subsequent sentence in 1991 of 55 years  
10 imprisonment for bank robbery and use of a firearm during a  
11 crime of violence. On direct appeal, the Ninth Circuit Court  
12 of Appeals affirmed petitioner's convictions and sentence.  
13 United States v. Neal, 976 F.2d 601 (9<sup>th</sup> Cir. 1992); United  
14 States v. Neal, 977 F.2d 593 (9<sup>th</sup> Cir. 1992). Several years  
15 later, the Ninth Circuit Court of Appeals affirmed the  
16 district court's denial of petitioner's first 28 U.S.C.  
17 § 2255 petition. U.S. v. Neal, 129 F.3d 128 (9<sup>th</sup> Cir.  
18 1997)(unpublished opinion).

19 In the intervening years, petitioner has filed a number  
20 of other unsuccessful challenges to his sentence and attacks  
21 on his conviction.<sup>1</sup> Of particular significance here is that  
22 on two separate occasions the Ninth Circuit has denied  
23 petitioner's application for authorization to file in this  
24 court a second or successive petition under 28 U.S.C. § 2255.

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26 <sup>1</sup> Indeed, petitioner has gone so far as to seek habeas corpus relief in  
27 the United States District Court for the District of Columbia. The court dismissed  
28 that action as an impermissible successive motion under 28 U.S.C. § 2255 because  
again Neal had not obtained certification from the Ninth Circuit. Neal v.  
Gonzales, 2007 WL 1322113, at \*2 (D.D.C. May 4, 2007), aff'd without pub'd opinion,  
258 Fed.Appx. 339 (D.C Cir. 2007).

1 The Ninth Circuit uniformly denied those applications because  
2 plaintiff did not make a *prima facie* showing under that  
3 statute. See Docs. 133 (No. 01-70790); and 135 (No. 01-  
4 71845).

5 Construing petitioner's motion to set aside judgment for  
6 fraud upon the court pursuant to Fed. R. Civ. P. Civ. P.  
7 60(b) as an application to file a second or successive  
8 section 2255 petition, the Ninth Circuit likewise denied that  
9 motion. The Ninth Circuit did so because petitioner did not  
10 make a *prima facie* showing under that statute. Doc. 147 (No.  
11 04-72347). Additionally, the Ninth Circuit denied another  
12 application by petitioner for authorization to file in this  
13 district court a second or successive section 2255 motion.  
14 The Court denied that application without prejudice to  
15 petitioner "filing a new application which complies with the  
16 requirements of the rules[.]" Doc. 134 (No. 01-71367).  
17 Further, construing another of petitioner's section 2255  
18 motions as a writ of mandamus, the Ninth Circuit denied it.  
19 See Doc. 131 (No. 01-70650). The Ninth Circuit also  
20 summarily affirmed an order of this court denying  
21 petitioner's post-judgment motion for release. U.S. v. Neal,  
22 263 Fed.Appx. 572 (9<sup>th</sup> Cir. 2008) (unpublished opinion).

23 In 2006, petitioner filed an "*Ex parte* Motion to Vacate  
24 Void Judgment Pursuant to Rule 60(b)(4)(5)" (doc. 158).  
25 Despite how petitioner styled that motion, the court  
26 construed it to be a second or successive section 2255  
27 petition. Neal v. U.S., 2006 WL 2481126, at \*1 (D.Ariz. Aug.  
28 24, 2006) ("Neal I"). The court denied that petition because

1 Neal did not show that he had requested or received  
2 authorization from the Ninth Circuit to file a second or  
3 successive petition under 28 U.S.C. § 2255. Id. Petitioner  
4 did appeal that denial, but eventually he voluntarily  
5 withdrew it. Doc. 213 (No. 09-10181).

6 On March 15, 2010, while the foregoing motions were  
7 pending, petitioner filed a "Notice of Interlocutory Appeal  
8 to the United States Court of Appeal for the Ninth Circuit."  
9 Doc. #218. In that Notice, petitioner is appealing an  
10 undocketed March 2, 2010, memorandum from the Clerk of the  
11 Court, wherein the Clerk allegedly "refus[ed] to file  
12 documents in the Public Record." Id.

### 13 Discussion

#### 14 I. Jurisdiction

15 The first issue which the court must address is the  
16 impact on the pending motions of petitioner's most recent  
17 filing of a Notice of Appeal. Generally, the filing of a  
18 notice of appeal divests a district court of jurisdiction  
19 over those aspects of the case involved in the appeal. See  
20 Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58,  
21 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (*per curiam*) ("The  
22 filing of a notice of appeal ... confers jurisdiction on the  
23 court of appeals and divests the district court of its  
24 control over those aspects of the case involved in the  
25 appeal."). However, "[w]hen a Notice of Appeal is defective  
26 in that it refers to a non-appealable interlocutory order, it  
27 does not transfer jurisdiction to the appellate court, and so  
28 the ordinary rule that the district court cannot act until

1 the mandate has issued on the appeal does not apply."  
2 Nascimento v. Dummer, 508 F.3d 905, 908 (9<sup>th</sup> Cir. 2007)  
3 (citation omitted). Hence, "[w]here the deficiency in a  
4 notice of appeal, by reason of untimeliness, lack of  
5 essential recitals, or reference to a non-appealable order,  
6 is clear to the district court, it may disregard the  
7 purported notice of appeal and proceed with the case, knowing  
8 that it has not been deprived of jurisdiction." Ruby v.  
9 Secretary of the Navy, 365 F.2d 385, 388-89 (9<sup>th</sup> Cir. 1996)  
10 (emphasis added). Simply put, "[f]iling an appeal from an  
11 unappealable decision does not divest the district court of  
12 jurisdiction." U.S. v. Hickey, 580 F.3d 922, 928 (9<sup>th</sup> Cir.  
13 2009) (citation omitted), cert. denied, No. 09-1093, \_\_\_ U.S.  
14 \_\_\_, \_\_\_ S.Ct. \_\_\_, \_\_\_ L.Ed.2d \_\_\_, 78 U.S.L.W. 3549 (April  
15 19, 2010).

16 Here, it is plain on the face of petitioner's Notice of  
17 Appeal that it is improper. Not only is it interlocutory,  
18 but petitioner is not appealing an order or judgment of this  
19 court, but rather a "memorandum" by the Clerk of the Court.  
20 As an aside, the court observes that because that memorandum  
21 is undocketed, the court has no idea as to its content. In  
22 any event, clearly, petitioner's filing of a Notice of Appeal  
23 after the filing of the pending motions did not divest this  
24 court of jurisdiction to entertain those motions. Having  
25 found that it has jurisdiction, the court will now address  
26 petitioner's motions.

## 27 **II. Motion to "Vacate Void Judgment"**

28 The rambling and oft-times incoherent nature of

1 petitioner's Rule 60(b)(3) motion made it exceedingly  
2 difficult for the court to ascertain exactly what he is  
3 claiming. What is clear though is the nature of the relief  
4 which petitioner Neal is seeking. Petitioner seeks "total  
5 dismissal of all [criminal] charges [against him] along with  
6 an order to vacate the judgment & commitment order and [his]  
7 immediate release from custody[.]" Mot. (doc. 216) at 10-11,  
8 ¶ 22.); see also id. at 14, ¶ 2.) (same).

9       Petitioner styles this motion as one to vacate or void  
10 judgment brought pursuant to Fed. R. Civ. P. 60(b)(3). Id.  
11 at 1. That Rule allows, *inter alia*, a court to "relieve a  
12 party . . . from a final judgment, order, or proceeding for  
13 . . . fraud[.]" Fed. R. Civ. P. 60(b)(3). However, given  
14 that petitioner is effectively seeking to vacate or set aside  
15 his sentence, the court construes this a motion brought  
16 pursuant to 28 U.S.C. § 2255. When it does that, the court  
17 finds that once again, Neal's "petition was not properly  
18 filed." Neal I, 2006 WL 2481126, at \*1. "Section 2255  
19 provides that a second or successive motion made pursuant to  
20 that section must be certified by a panel of the appropriate  
21 court of appeals to contain newly discovered evidence or a  
22 new rule of constitutional law." Id. (citing 28 U.S.C.  
23 § 2255). "Until the Ninth Circuit Court of Appeals certifies  
24 that a second or successive petition may be filed, this Court  
25 is without jurisdiction to consider Neal's claims." Id.  
26 (citing United States v. Allen, 157 F.3d 661, 664 (9<sup>th</sup> Cir.  
27 1998)).

28       As before, petitioner "Neal has made no showing that a

1 request for certification was made or that authorization was  
2 granted by the Ninth Circuit Court of Appeals." Id.  
3 Therefore, the court denies petitioner's "Commercial Notice  
4 and Pleadings to Vacate Void Judgment Pursuant to Rule  
5 60(b)(3)[]" based upon lack of jurisdiction. Mot. (doc. 216)  
6 at 1.

7 Even if the court were to treat petitioner's motion as  
8 based upon Fed. R. Civ. P. 60(b)(3), it would still deny that  
9 motion. Among others, motions brought pursuant to subsection  
10 (b)(3) "must be made . . . no more than a year after the  
11 entry of the judgment or order or the date of the  
12 proceeding." Fed. R. Civ. P. 60(c)(1). Here, petitioner was  
13 convicted in 1990 and sentenced in 1991. Obviously, this  
14 motion made nearly 20 years after the fact is not timely.

15 The court is well aware that Fed. R. Civ. P. 60(d)(3)  
16 "does not limit a court's power . . . to set aside a judgment  
17 for fraud on the court." The court is equally well aware  
18 that because "[f]raud on the court' is a claim that exists  
19 to protect the integrity of the judicial process," such a  
20 claim, in contrast to other fraud-based Rule 60(b)(3)  
21 motions, "cannot be time barred." Bowie v. Maddox, 677  
22 F.Supp.2d 276, 278 (D.C.D. 2010) (citing, *inter alia*, 12  
23 James Wm. Moore et al., Moore's Federal Practice,  
24 § 60.21[4][g] & n. 52 (3d ed. 2009)). Thus, insofar as  
25 petitioner Neal's Rule 60(b)(3) motion can be read as  
26 asserting a fraud upon the court, that aspect of his motion  
27 would not be time barred.

28 Nonetheless, that aspect of petitioner's motion fails on

1 the merits. The Ninth Circuit "narrowly" construes "the term  
2 'fraud on the court[.]'" Appling v. State Farm Mut. Auto.  
3 Ins. Co., 340 F.3d 769, 780 (9<sup>th</sup> Cir. 2003). It "embrace[s]  
4 only that species of fraud which does or attempts to, defile  
5 the court itself, or is a fraud perpetrated by officers of  
6 the court so that the judicial machinery can not perform in  
7 the usual manner its impartial task of adjudicating cases  
8 that are presented for adjudication." Id. (citation  
9 omitted). Indeed, the Ninth Circuit has so narrowly defined  
10 "fraud on the court" that it does not encompass "[n]on-  
11 disclosure, or perjury by a party or witness . . . , by  
12 itself[.]" Id. (citation omitted). "Fraud on the court  
13 requires a 'grave miscarriage of justice,' . . . and a fraud  
14 that is aimed at the court." Id. (quoting United States v.  
15 Beggerly, 524 U.S. 38, 47, 118 S.Ct. 1862, 141 L.Ed.2d 32  
16 (1998)).

17 In the present case, petitioner Neal has not provided any  
18 evidence of fraudulent conduct, much less any evidence that  
19 rises to the level of fraud on the court amounting to a  
20 "grave miscarriage of justice." The bulk of petitioner's  
21 motion consists largely of nonsensical rambling, with  
22 absolutely no evidentiary basis for support.

23 To illustrate, as he has previously, petitioner invokes  
24 the Uniform Commercial Code ("U.C.C.") for no logical reason.<sup>2</sup>  
25 This time petitioner repeatedly refers to himself as a

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27 <sup>2</sup> In Neal I, petitioner asserted that "Denard Darnell Neal is a  
28 'fictitious-corporate entity,' thus requiring that all dealings with such entity  
[must] comply with the [U.C.C.]." Neal I, 2006 WL 2481126, at \*1 (citation  
omitted).



1 "Secured Party" in one form or another, and also as a  
2 "Holder-In-Due-Course[.]" See, e.g., Mot. (doc. 216) at 3,  
3 ¶¶ II (4.)); (5.)); (7.)). In a similar and equally  
4 incongruous manner plaintiff further alleges that he was  
5 "arrested . . . and imprisoned without due process . . . for  
6 the sole purpose of being held as surety for an ILLEGAL BOND  
7 AND SECURITIES BEING MARKETED IN THE IDENTITY OF THE  
8 COLLATERAL/DEBTOR DENARD DARNELL NEAL©, the register[ed]  
9 property of the Secured Party-Plaintiff." Id. at 7, ¶ 12.)).  
10 As is readily apparent, even if the court were to deem  
11 petitioner's motion as having been brought pursuant to Fed.  
12 R. Civ. P. 60(b)(3) for fraud on the court, still, the court  
13 would find this motion to be wholly without merit.  
14 Accordingly, regardless of the type of fraud alleged,  
15 assuming *arguendo* that petitioner has brought a Rule 60(b)(3)  
16 motion, the court denies that motion altogether.

### 17 **III. Change of Venue**

18 In addition to seeking to vacate the judgment against  
19 him, petitioner is seeking an "immediate change of venue to  
20 the Federal District Court" in Anchorage, Alaska. Mot. (doc.  
21 215) at 3, ¶ 2.)). Apparently petitioner is basing this  
22 motion upon what he perceives as a "conflict of interest."  
23 Mot. (doc. 215). This alleged conflict arises from  
24 petitioner's wholly unsubstantiated and distorted theory that  
25 "the UNITED STATES ATTORNEY OFFICE IN PHOENIX . . . AND THE  
26 UNITED STATES DISTRICT COURT[, ] DISTRICT OF ARIZONA[, ]  
27 PHOENIX DIVISION IS [sic] PARTIES IN A[N] ON-GOING CRIMINAL  
28 SCHEME . . . [TO] CREATE[] AND MARKET BONDS AND SECURITIES IN

1 THE IDENTITY OF SECURED PARTY Denard-Darnell: Neal[.]” Mot.  
2 (doc. 215) (emphasis in original).

3 Petitioner cites no statutory or other legal basis for  
4 his motion to change venue, however. Presumably he is  
5 relying upon 28 U.S.C. § 1404, stating in relevant part that  
6 “[f]or the convenience of parties and witnesses, in the  
7 interest of justice, a district court *may* transfer any civil  
8 action to any other district court . . . where it might have  
9 been brought.” 28 U.S.C. § 1404(a) (emphasis added). “The  
10 purpose of § 1404(a) is to prevent the waste of time, energy,  
11 and money and to protect litigants, witnesses and the public  
12 against unnecessary inconvenience and expense.” Metz v. U.S.  
13 Life Ins. Co. in City of New York, 674 F.Supp.2d 1141, 1145  
14 (C.D.Cal. 2009) (quotations omitted) (citing, *inter alia*, Van  
15 Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945  
16 (1964)).

17 “Analysis under § 1404 is two-fold.” Id. “First, the  
18 defendant must establish that the matter ‘might have been  
19 brought’ in the district to which transfer is sought.” Id.  
20 (quoting 28 U.S.C. § 1404(a)). “This includes demonstrating  
21 that subject matter jurisdiction, personal jurisdiction, and  
22 venue would have been proper if the plaintiff had filed the  
23 action in the district to which transfer is sought.” Id.  
24 (citations and internal quotation marks omitted). “Second,  
25 courts must consider the following three factors: (1) the  
26 convenience of the parties; (2) the convenience of the  
27 witnesses; and (3) the interests of justice.” Id. (citing,  
28 *inter alia*, 28 U.S.C. § 1404(a)).

1 In the present case, petitioner Neal has not even  
2 attempted to meet the first prong of section 1404(a), *i.e.*,  
3 that this matter "might have been brought" in the United  
4 States District Court for the District of Alaska. So, there  
5 is no need for the court to proceed to the second prong of  
6 the analysis under section 1404(a). Instead, the court  
7 easily finds that petitioner has not met his burden of  
8 establishing that a change of venue is warranted.

9 **IV. Status**

10 The court's ruling herein denying petitioner Neal's Rule  
11 60(b)(3) motion renders moot his petitioner's "request for  
12 the Status and/or adjudication of [his] Rule 60(b)(3)"  
13 motion. Mot. (doc. 217) at 1. Accordingly, the court denies  
14 that request as moot.

15 **V. IFP Request**

16 Evidently petitioner's IFP request as to his most recent  
17 Ninth Circuit Appeal was precipitated by an April 19, 2010,  
18 order of that Court noting his failure to pay the required  
19 filing and docketing fees. See United States v. Neal, No.  
20 10-10117 (9<sup>th</sup> Cir. Apr. 19, 2010) (doc. 4-1). The Ninth  
21 Circuit required petitioner Neal "[w]ithin 21 days after the  
22 date of th[at] order" to pay "the fees to the district court  
23 and provide written proof to th[at] court of having done so  
24 o[r] move for In Forma Pauperis." Id. (emphasis added).  
25 Petitioner opted to seek IFP status in this court.

26 Given that petitioner Neal was "determined to be  
27 financially unable to obtain an adequate defense in [his]  
28 criminal case," under certain circumstances, he may "proceed

1 on appeal in forma pauperis without further authorization[.]”  
2 Fed. R. App. Pro. 24(3)(A). Petitioner’s “Notice of  
3 Interlocutory Appeal” of an undocketed memorandum from the  
4 Clerk of the Court supposedly “refus[ing] to file documents  
5 in the Public Record[,]” (doc. 218), is not taken in “good  
6 faith” as Rule 24(3)(A) requires, however. That appeal is  
7 not taken in good faith because, as already explained,  
8 petitioner is not appealing an order or judgment of this  
9 court, but rather a “memorandum” by the Clerk of the Court.  
10 Moreover, because that “memorandum” is not docketed and not  
11 otherwise been provided to the court, on the merits, it is  
12 impossible for this court to determine whether this appeal is  
13 taken in good faith. Accordingly, the court certifies that  
14 any appeal of the memorandum from the Clerk of the Court  
15 dated March 2, 2010 would not be taken in good faith. The  
16 court, therefore, denies petitioner’s request for IFP status  
17 with respect to his Notice of Interlocutory Appeal filed on  
18 March 18, 2010.

19 For the reasons set forth above, IT IS ORDERED that:

20 (1) Petitioner’s “Request for Immediate Change of Venue”  
21 (doc. 215) is DENIED;

22 (2) Petitioner’s “Commercial Notice and Pleadings to  
23 Vacate Void Judgment Pursuant to Rule 60 (b)(3)[.]” (doc. 216)  
24 is DENIED;

25 (3) Petitioner’s “Request For Status Of Filed  
26 Documents[.]” (doc. 217) is DENIED as moot; and

27 (4) Petitioner’s “Request For Waiver of Costs, Fees, and  
28 Fines[.]” (doc. 221) associated with his Notice of Appeal

1 filed in the Ninth Circuit Court of Appeals on March 18, 2010  
2 (doc. 218) is DENIED.

3 DATED this 28th day of April, 2010.

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12 Copies to counsel of record and petitioner *pro se*

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Robert C. Broomfield  
Senior United States District Judge